

48t6cria

1 UNITED STATES DISTRICT COURT  
 2 SOUTHERN DISTRICT OF NEW YORK

3 KEVIN DAMION CRICHLLOW,

4 Plaintiff,

5 v.

07 CV 3222 (RPP)

6 NEW YORK CITY DEPARTMENT OF  
 7 CORRECTIONS, et al.,

8 Defendants.

**MEMO ENDORSED**

New York, N.Y.  
 March 29, 2008  
 12:00 a.m.

11 Before:

12 HON. ROBERT P. PATTERSON, JR.,

13 District Judge

14 APPEARANCES

15 STROOCK & STROOCK & LAVAN  
 Attorneys for Plaintiff

16 BY: JAMES LAWRENCE BERNARD  
 MICHELLE SCHOTT

17 MICHAEL A. CARDOZO, Corporation Counsel  
 18 for the City of New York  
 Attorney for Defendants

19 BY: DEBORAH ALYSE DORFMAN

20 *The motion of Defendants to dismiss*  
 21 *the amended complaint is denied for the reasons*  
 22 *set forth in this transcript.*  
 23 *So ordered.*  
 24 *Robert Patterson Jr.*  
 25 *5/2/08*

USDC SDNY  
 DOCUMENT

ELECTRONICALLY FILED

DOC #:

SOUTHERN DISTRICT REPORTERS, P.C.

DATE FILED

5/2/08

(212) 805-0300

48t6cria

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK  
-----x

3 KEVIN DAMION CRICHLLOW,

4 Plaintiff,

5 v.

07 CV 3222 (RPP)

6 NEW YORK CITY DEPARTMENT OF  
7 CORRECTIONS, et al.,

8 Defendants.  
-----x

9 New York, N.Y.  
10 March 29, 2008  
12:00 a.m.

11 Before:

12 HON. ROBERT P. PATTERSON, JR.,

13 District Judge

14 APPEARANCES

15 STROOCK & STROOCK & LAVAN  
Attorneys for Plaintiff  
16 BY: JAMES LAWRENCE BERNARD  
MICHELLE SCHOTT

17 MICHAEL A. CARDOZO, Corporation Counsel  
18 for the City of New York  
Attorney for Defendants  
19 BY: DEBORAH ALYSE DORFMAN

48t6cria

1 (Case called; in open court)

2 THE COURT: Ms. Dorfman, I guess it is your motion.

3 MS. DORFMAN: Thank you, your Honor. May it please  
4 the Court, my name is Deborah Dorfman. I represent the City  
5 defendants in this matter. We are here on the defendant's  
6 motion to dismiss the complaint in its entirety.

7 Essentially as I have discussed in my papers, and also  
8 I would like to discuss further today, the complaint is really  
9 about, for the most part, uncomfortable conditions at Rikers  
10 Island, namely, three different facilities at which the  
11 plaintiff was during his confinement -- the OBCC, the EMTc, and  
12 the GRVC. Those are just acronyms for different facilities on  
13 Rikers Island.

14 THE COURT: There is a fourth one in there, too?

15 MS. DORFMAN: Not to my knowledge, your Honor. He has  
16 three.

17 MS. SCHOTT: It is three, your Honor. He is currently  
18 in a fourth facility on Rikers Island, but that is not part of  
19 the complaint.

20 THE COURT: Which one is not part of the complaint?

21 MS. SCHOTT: The Anna M. Cross Center is not part of  
22 the complaint.

23 THE COURT: I thought he was in the Taylor --  
24 something Taylor.

25 MS. SCHOTT: Yes. During his entire period of

48t6cria

1 incarceration he has been transferred between four different.

2 THE COURT: Taylor, George R. Vierno.

3 MS. SCHOTT: And the Otis Bantum Correctional Center.

4 THE COURT: And then the A.M. Casey, but that is not  
5 part of it.

6 MS. SCHOTT: That's right.

7 THE COURT: So his present conditions of confinement  
8 are not part of the lawsuit?

9 MS. SCHOTT: No. At this time there has been no  
10 allegations concerning that facility.

11 THE COURT: All right.

12 MS. DORFMAN: To my knowledge plaintiff only seeks an  
13 award of compensatory damages, and according to his reply  
14 papers apparently nominal damages as well, but no claims for  
15 injunctive relief.

16 As I was saying essentially this is about  
17 uncomfortable conditions of care while at the these three  
18 different facilities all of which are operated by different  
19 wardens as alleged in the complaint.

20 There are several other complaints that plaintiff has  
21 made. They don't really necessarily relate to conditions of  
22 confinement per se and that is related to two assaults that he  
23 alleges that he suffered as a result of inmate violence and one  
24 claim of inadequate medical care.

25 For the reasons that were discussed in my papers and

48t6cria

1 that I would like to discuss today, none of these claims rise  
2 to the level of constitutional violation of which relief can be  
3 granted because none of these claims assert facts that meet the  
4 deliberate indifference test which is required for Eighth  
5 Amendment complains, which these are.

6 Mr. Crichlow is a convicted prisoner. He was  
7 convicted throughout this entire time so therefore the Eighth  
8 Amendment is the only applicable constitutional amendment here.  
9 Although, the plaintiffs have referenced the Fourteenth  
10 Amendment, the Fourteenth Amendment does not apply.

11 The deliberate indifference standard, the plaintiff  
12 has to allege facts sufficient to show two parts of that, which  
13 are: One, an objective standard that the deprivation was  
14 sufficiently serious; and/or that there was a substantial risk  
15 of harm that he has been placed in; and that the sufficiently  
16 serious -- to show that the violation was sufficiently serious,  
17 the deprivation has to really result in minimal -- in a denial  
18 of minimal civilized measures of life's necessities.

19 In addition, the second prong is that plaintiff must  
20 allege facts sufficient to show a sufficiently culpable state  
21 of mind on the part of the defendant. It is not sufficient to  
22 show that an official's general knowledge of conditions at a  
23 facility constitute deliberate inference, rather there has to  
24 be knowledge of a specific risk of harm to the individual who  
25 is bringing the claim.

48t6cria

1           In that light I would like to examine the plaintiff's  
2       claims. I realize there are numerous claims, numerous factual  
3       claims, and there are many different ways to look at these  
4       claims. I think the most effective way to really look at them  
5       in an efficient manner given time constraints today is to  
6       really go facility by facility. I would like to look at these  
7       claims in terms of while he was at the OBCC, while he was at  
8       the EMTC, and also while he was at the GRVC.

9           I would like to start with the OBCC. Mr. Crichlow was  
10      there for a total of approximately 16 days from February 1 to  
11      February 16th, 2007. During which time Mr. Crichlow alleges a  
12      variety of conditions, complaints. He alleges that he was  
13      subjected to living in a dorm area with beds that were too  
14      close to each other. It should be noted, however, that those  
15      allegations were for a -- he was in that area with the dorm  
16      with the close beds for approximately seven days out of the  
17      approximately 16 days that he was at the OBCC. So he then  
18      alleges he was moved to a cell area and doesn't allege that his  
19      beds were close to other inmates during that time period. So  
20      we are talking about only seven days at the OBCC during which  
21      he is alledged he had to live in a crowded living area without  
22      privacy and with his bed being too close to other inmates.

23           THE COURT: Six inches is what he said.

24           MS. DORFMAN: That is correct, your Honor. He also  
25      alleges that the bed space was in violation of the BOC's



48t6cria

1 minimal standard. However, if one looks at minimal standards,  
2 the minimal and standards don't really discuss -- first,  
3 minimal standards are not enforceable in federal court and also  
4 he complains that there were -- I believe he complains there  
5 were 50 inmates in this dorm area. If you look at *Benjamin v.*  
6 *Frasier*, the Second Circuit specifically said that the way that  
7 plaintiffs are presenting the overcrowding in this context is  
8 not necessarily unconstitutional. More has to be shown.  
9 Furthermore, the minimal standards don't disallow 50 inmates in  
10 a living area, particularly if they are convicted. Actually,  
11 the minimal standard allow for 60 inmates in an open-dorm area.

12 THE COURT: He is not a convicted inmate is he?

13 MS. DORFMAN: He was, yes. The entire time he was a  
14 convicted inmate. That is why I was saying the Eighth  
15 Amendment is the only amendment applicable here, not the  
16 Fourteenth Amendment.

17 So the whole time, even when he was at OBCC, the fact  
18 that he was in an area with 50 other inmates really doesn't  
19 violate the minimal standards. And even if it did, the minimal  
20 standards don't necessarily rise to the level of a  
21 constitutional violation, and I refer to Court to *Benjamin v.*  
22 *Frasier*.

23 Furthermore, while he was at the OBCC --

24 THE COURT: Benjamin v.?

25 MS. DORFMAN: Frasier.

48t6cria

1 THE COURT: *Benjamin v. Frasier*.

2 MS. DORFMAN: I can provide the Court with the  
3 citation if you would like. That is at 343 F.3d.

4 THE COURT: Is it dealing with the same space?

5 MS. DORFMAN: *Benjamin v. Frasier* was actually about  
6 pretrial detainees at Rikers Island as well. So although it  
7 may not --

8 THE COURT: All those dormitories are all different  
9 over there.

10 MS. DORFMAN: That --

11 THE COURT: My recollection.

12 MS. DORFMAN: That is correct. The ruling in *Benjamin*  
13 was that there was not a constitutional right to a particular  
14 amount of bed space. And the minimal standards that talk about  
15 how much bed space should be allowed for inmates and how many  
16 inmates should be in the living area, the minimum standards --  
17 they are published by the Board of Corrections. They don't  
18 differentiate from facility to facility. Rather, they  
19 differentiate between a pretrial detainee and a sentenced  
20 inmate.

21 so in the minimal standards, which are attached to my  
22 motion, it sets forth that 50 inmates can be placed who are  
23 pretrial in the dormitory areas and up to 60 inmates will be  
24 allowed for sentenced inmates. So there is no differentiation.

25 Now, whether or not it is a constitutional violation,



48t6cria

1 other factors have to be considered.

2 THE COURT: The U.N. regulations call for certain  
3 amount of space per square feet per inmate, don't they?

4 MS. DORFMAN: They do, your Honor. As far as I know,  
5 there is a split in the Supreme Court as to whether or not  
6 those regulations would be applicable here. I know that the  
7 United States has actually not signed off to the most recent  
8 charter of the U.N.

9 THE COURT: I am sorry?

10 MS. DORFMAN: The U.S. has not ratified the most  
11 recent charter to the U.N. and there is a split in the Supreme  
12 Court as to whether international standards would be applied  
13 Nationally to the United States.

14 THE COURT: What do you mean by a split in the Supreme  
15 Court?

16 MS. DORFMAN: I should say there is a five to four as  
17 far as I am aware.

18 THE COURT: It came down one way or another.

19 MS. DORFMAN: In favor of looking at international  
20 standards. However, I would just note that the United States  
21 has not ratified the most recent U.N. charter as other  
22 countries have. So don't know specifically if the bed space  
23 allotment is something within that charter that the United  
24 States would accept as controlling law here. I am not sure if  
25 that has been litigated.

48t6cria

1 THE COURT: What is the case in the Supreme Court.

2 MS. DORFMAN: I don't remember off the top of my head.  
3 I was just talking about it this Saturday, but I apologize.

4 Nevertheless, even if let's say that these standards  
5 violated the U.N. standards, even if that were the case, he was  
6 there for seven days. The case law in this jurisdiction is  
7 that, and also in the *Wilson* case from the Supreme Court, for a  
8 short period of time living in such conditions just does not  
9 rise to a level of a constitutional violation.

10 So we are talking about seven days during which  
11 Mr. Crichlow at the OBCC was placed in this dorm area. In his  
12 complaint he talks about that he was there from the first of  
13 February until he was moved to a cell area on or about February  
14 7th, which is at paragraph 20 in his complaint.

15 So he wouldn't be able to sufficiently state facts to  
16 support a finding of sufficiently serious depravation under the  
17 first prong of the deliberate indifference test.

18 Mr. Crichlow also in his other allegations --

19 THE COURT: Did any of these cases that relie on were  
20 they summary judgment cases or were they partially dismissed  
21 cases?

22 MS. DORFMAN: If you give me a moment, your Honor.

23 THE COURT: *Benjamin v. Frasier*?

24 MS. DORFMAN: That was not a motion to dismiss.

25 THE COURT: It was a summary judgment case?

48t6cria

1 MS. DORFMAN: Actually, *Benjamin* is a long, litigated  
2 case that comes out of my office. It is if front of Judge Baer  
3 and it is still in front of Judge Baer on certain issues.

4 THE COURT: If it goes back to the original *Benjamin*  
5 case then that has been hanging around for 30 years.

6 MS. DORFMAN: I believe so. I have only been at the  
7 Corporation Counsel for almost a year, your Honor. I don't  
8 know the history of *Benjamin* except I do know that from  
9 speaking with my colleagues, particularly Mr. Orsen who handles  
10 that case, that it has been around for sometime and it has gone  
11 up to the Second Circuit at least twice. So it is not a motion  
12 for summary judgment.

13 THE COURT: Whose case is it?

14 MS. DORFMAN: As far as I know it is in front of Judge  
15 Baer.

16 THE COURT: He got it from Lester.

17 MS. DORFMAN: I don't know the original history of it.

18 I guess the point I would like to make in regard to  
19 the OBCC claims, because there are many of them and I realize  
20 that the Court has limited time with counsel today, that we are  
21 talking about again a period of a total of approximately 16  
22 days at which he was at OBCC and whether or not there can be a  
23 dispute in what the conditions were like. The fact is that  
24 there is no dispute and he has alleged that he has been there  
25 for 16 days. So any of those conditions at the OBCC were

48t6cria

1 temporary and really don't rise to the level of a  
2 constitutional violation at the end of the day.

3 Also, I think it is important to note that plaintiff  
4 did not allege any physical injuries as a result of being  
5 placed at the OBCC. Even though he states that he was  
6 inappropriately placed and there was a risk of violence because  
7 that was apparently allegedly a placement for gang members, he  
8 does not allege that he suffered any harm whatever in terms of  
9 an assault or any physical injury as a result of being placed  
10 at the OBCC.

11 So therefore as far as his compensatory claims go, in  
12 terms of his placement at the OBCC and any claims at the OBCC,  
13 those would be barred by the Prison Reform Litigation Act. So  
14 that leaves him only with the possibility of seeking nominal  
15 damages. However, going back to my original point, which is  
16 that these claims here at the OBCC because they are not  
17 sufficiently seriously temporary in nature and all the other  
18 reasons stated in my papers, do not amount to a constitutional  
19 violation and thus nominal damages should not be available to  
20 him and any claims against Warden Hauerhane, who is the warden  
21 of OBCC, and any claims in regard to the OBCC should be  
22 dismissed on those ground.

23 THE COURT: I didn't remember that the was a  
24 dormitory. I thought they were all individual cells and I  
25 thought they were all for prisoners who acted out, disciplinary

48t6cria

1 problems. I thought it was for people who had disciplinary  
2 problems and fights and things of that sort that were placed in  
3 those. Times have changed.

4 MS. DORFMAN: If I may, your Honor, I would like to  
5 now talk about the claims at the GRVC.

6 THE COURT: All right.

7 MS. DORFMAN: I would like to talk about those because  
8 they are relatively short. Essentially, Mr. Crichlow makes --  
9 he was only there from August 25th to August 10th, 2007. So,  
10 again, we are talking about a very small period of time.  
11 Warden Shaw is the warden who was the warden at the time and  
12 who is the defendant who is alleged to have been in charge of  
13 the GRVC in plaintiff's complaint.

14 The claims that he raises are that he was not allowed  
15 to go to the law library. Although, he doesn't claim that he  
16 didn't have access to the law library materials. He alleged  
17 that he was not able to do his laundry during the approximately  
18 16 or 17 days that he was at the GRVC. He was allowed to have  
19 four showers. His final claim was for the last three days of  
20 his confinement, the lights broke in his cell and nobody fixed  
21 them so he sat in darkness for three days.

22 I think -- again, the first point I would like to make  
23 is that the placement at GRVC was a relatively short period of  
24 time. It was approximately 16 or 17 days and so the conditions  
25 that he suffered during that period of time are just not



48t6cria

1 sufficiently serious, whether you look at them in their  
2 totality or you look at them individually, to arise to the  
3 level of a constitutional violation.

4 Furthermore, in regards to his claim about not going  
5 to the law library, not only does he allege he wasn't able to  
6 have access to law library materials, he makes no allegations  
7 that he wasn't able to work on -- able to file and prosecute a  
8 case. Whether it be a case about his conditions, obviously he  
9 was able to file this case because went pro se originally. He  
10 makes no allegations that his criminal case was in any way  
11 impaired, that he was denied inability to file an appeal or  
12 have access to materials to address in the other legal matter  
13 while in the GRVC.

14 That is a requirement under *Luis v. Casey*. The United  
15 States Supreme Court clearly stated that that has to be one of  
16 the elements in order to have standing to bring a claim for  
17 inadequate access to a law library. Those allegations are just  
18 not here. So his claim in regards to the law library should be  
19 denied.

20 Again, the other conditions that he suffered were for  
21 a relatively short period of time. He also makes no allegation  
22 that he suffered any physical harm and thus his claims for  
23 compensatory damages at the GRVC should be denied because they  
24 are barred by the Prison Reform Litigation Act. That would  
25 leave him with only nominal damages. However, as I have stated



48t6cria

1 because he has not made a claim for constitutional violations  
2 and not stated facts sufficient to bring a claim for those, any  
3 claims for nominal damages should also be dismissed as they  
4 apply to the GRVC.

5 I would also note that -- I respectfully refer the  
6 Court to Count One and Two of the complaint -- no where in  
7 Counts One or Two does the plaintiff reference the policies and  
8 practices in regards to the to GRVC. The only reference to the  
9 OBCC and EMTC, specifically in Count One paragraph 51, the  
10 allegation of the defendants' policy, practices, acts and  
11 omissions with respect to overcrowding at OBCC and EMTC  
12 deprived the plaintiff of adequate shelter, reasonable safety,  
13 basic human needs, and placed Mr. Crichlow at unreasonable risk  
14 or increased violence, illness, mental suffering and  
15 deteriorating health.

16 There is no reference to the GRVC in this paragraph,  
17 and if the Court looks at the rest of the sections, there is a  
18 general discussion of the defendants' knowing of these  
19 conditions, but this count really does not, when you look at it  
20 as a whole, appear to the GRVC. Similarly, the claim against  
21 the City of New York references in paragraph 57 again just the  
22 conditions of OBCC and the EMTC is not at GRVC.

23 So in sum I would argue that any claims against Warden  
24 Shaw who runs the GRVC and any claims that relate to the GRVC  
25 should be dismissed for failure to state a claim and also lack

48t6cria

1 of standing because plaintiff does not have standing to bring a  
2 law library claim.

3 Now I would like finally to move to the EMTC if that  
4 would be all right with your Honor. I would like to talk about  
5 the EMTC in several portions. First discussing the overall  
6 general conditions of confinement and then specifically talk  
7 about the assaults and the medical care. Because the alleged  
8 assaults were alleged to have occurred at EMTC not at the other  
9 two facilities. Similarly, the alleged inadequate medical care  
10 also is alleged only to have occurred at the EMTC not at any of  
11 the other facilities.

12 Just starting with the conditions of confinement,  
13 again, it is defendants' position that essentially plaintiff is  
14 complaining of uncomfortable conditions. Unfortunately, that  
15 is the nature of jails and prisons. They are not comfortable.  
16 They are not pleasant places. Again, Mr. Crichlow complain  
17 about bed space in the EMTC. He was not in the dormitory the  
18 entire time. He was at the EMTC for two and a half months  
19 according to the complaint and he was in a dormitory area where  
20 he alleges the beds were too close together not the entire  
21 time. He alleges the rest of the time he was in fact placed in  
22 a cell. He was in the EMTC for a total of approximately six  
23 and a half months when you exclude the period of time that he  
24 left at the end of July and beginning of August to go to the  
25 GRVC.

48t6cria

1 He has a number of conditions, complaints that he  
2 didn't always get the toiletries that he needed, the laundry  
3 service was not always provide, that he didn't get regular  
4 exercise, recreation or access to an indoor gym and sometimes  
5 he was not able to be transported into religious services  
6 because there was not enough staff.

7 In regard to the religious services, the issue of  
8 transporting inmates to religious service was actually dealt  
9 with in a case called the *Mohammed* case and if you excuse me  
10 for one moment I will get that citation.

11 THE COURT: Don't those claims have to be adjudged by  
12 the totality of the circumstances?

13 MS. DORFMAN: Well, your Honor, I would argue that not  
14 all conditions as they relate to conditions of confinement  
15 actually do have to be analyzed in the totality of the  
16 circumstances. Rather, I think some are. Those that really  
17 rise to the level of a denial of a right that really violates  
18 life's minimal standard of decency.

19 THE COURT: What is your authority?

20 MS. DORFMAN: Actually, there are a number of cases  
21 that have held this.

22 THE COURT: I have to hear from the defense here very  
23 shortly. You are cutting into their time so please give them  
24 to me.

25 MS. DORFMAN: There is *Jones vs. Goord*, 190 F.R.D. 103

48t6cria

1 (S.D.N.Y. 1999). *Waldo v. Goord*. That is at 1998 U.S. Dist.  
2 LEXIS 15956 (N.D.N.Y 1998). *Bickers v. Vaughn*, 1997 U.S. Dist.  
3 LEXIS 1467.

4 THE COURT: Are you reading from the papers?

5 MS. DORFMAN: I apologize, your Honor. Yes, it is  
6 page 2 of my reply brief. I list all of the those cases in the  
7 first paragraph and distinguish the cases that the plaintiffs  
8 have cited so all the citations can be found there.

9 THE COURT: Let me hear from the defendants.

10 MR. BERNARD: Good morning, your Honor. James Bernard  
11 from Stroock & Stroock & Lavan on behalf of the plaintiff.

12 With the Court's permission, Ms. Schott, my colleague  
13 from our office will present the oral argument. This is  
14 Ms. Rosenberg in the back.

15 THE COURT: Very good.

16 MS. SCHOTT: Thank you for hearing us this morning,  
17 your Honor. In the matter efficiency, I would like to dive  
18 right in and address what I think is the central point of  
19 disagreements of the parties and I think your Honor already  
20 seized upon it when asking Ms. Dorfman shouldn't these  
21 allegations be reviewed under the totality of circumstances  
22 standard. That is plaintiff's position. Defendants' piecemeal  
23 analysis marginalizes the claims that Mr. Crichlow has brought.

24 This is not a case about uncomfortable conditions.  
25 This is a case about unsafe conditions at Rikers Island. And

48t6cria

1 the allegations concerning the three facilities at issue here  
2 show that there are in addition to overcrowding a lack of  
3 resources, staff is stretched thin. This leads to routine  
4 depravations that lead to increased aggression and increased  
5 risk of violence. In Mr. Crichlow's case, that increased risk  
6 of violence became a reality when he was assaulted twice in a  
7 three-month period and we cannot make light of those facts.

8 THE COURT: That was at the MDC?

9 MS. SCHOTT: Correct, your Honor.

10 THE COURT: Why should those GRVC allegations bear on  
11 overcrowding at the MDC?

12 MS. SCHOTT: Well, I think, your Honor, that is a good  
13 question. Unlike the case that city has cited analyzing two  
14 separate facilities on their own basis, Rikers should be  
15 treated differently. As Mr. Crichlow's experience shows,  
16 inmates are often transferred from housing facility to housing  
17 facility and really it is one big complex. And it shouldn't be  
18 treated any different than a jail which is housed in one  
19 building and inmates move from wing to wing.

20 I think the allegations here show that overall there  
21 is a systemic problem at Rikers with overcrowding and these  
22 conditions that lead to exactly the type of environment which  
23 led to Mr. Crichlow's injuries. These were very serious  
24 injuries.

25 Ms. Dorfman has minimalized them and suggested that he

48t6cria

1 hasn't alleged sufficient physical injury to seek compensatory  
2 damages here. His face was shattered. He was brutally  
3 attacked by an inmate with a scrub brush. He was so brutally  
4 attacked that they had to put him in solitary confinement  
5 because his face was in such a fragile state following the  
6 assault. That was following an earlier incident three months  
7 earlier where he was assaulted when speaking out on behalf of  
8 another inmate involved in a dispute over food.

9           These are the types of incidents when inmates are  
10 forced to share tight common spaces, eat in areas where they  
11 don't all have space to sit. People have lack of basic hygiene  
12 items. This all leads to a very tense environment. I think on  
13 reply defendants have not come back with any cases that would  
14 take away from Mr. Crichlow's claim.

15           The authorities that Ms. Dorfman has referred to *Jones*  
16 *v. Goord* is actually a motion to dismiss case where the Court  
17 says, At this stage I have to view the totality of the  
18 circumstances and give the plaintiff the benefit of the doubt.  
19 In *Bickers* the claim I believe was that the inmates were in  
20 cold, damp cells and contracted sore throats. Clearly we are  
21 talking about more serious claims of injury here arising from  
22 the cumulative effect of all of these conditions.

23           The U.S. Supreme Court case *Wilson v. Seiter* says you  
24 can take conditions in combination which standing alone would  
25 not be enough to give rise to constitutional violation and



48t6cria

1 consider them in their totality. When they all go to the same  
2 basic depravation, the same basic need that rises to a level of  
3 a constitutional violation. Here all of these things are going  
4 to personal safety.

5 THE COURT: How do the conditions in the Otis Bantum  
6 affect the conditions in the EMTC?

7 MS. SCHOTT: I would submit that like in  
8 Mr. Crichlow's case inmates are moving about freely through  
9 these facilities, they are being transferred. The defendant  
10 shouldn't be able to raise as a defense, Oh, this inmate was  
11 only in my facility for 16 days when it is really the same  
12 conditions throughout which are creating this environment that  
13 leads to these assaults.

14 THE COURT: How do they affect him at the Otis Bantum?  
15 What is the carryover between Otis Bantum and EMTC.

16 MS. SCHOTT: Well, just like he moved from OBCC to  
17 EMTC, there are other inmates moving from OBCC presumably. He  
18 didn't any change in his status. I don't know the reason for  
19 his being transferred. Presumably other inmates are being  
20 transferred just like him. I think it should be viewed more  
21 like in the same building. There shouldn't be a reason for  
22 viewing them any differently. It is all part of one complex at  
23 Rikers Island.

24 When you have these conditions across the board, it  
25 shouldn't be a defense that, Oh, well, after 16 days I moved

48t6cria

1 this inmate, therefore, you can't come after me. When it seems  
2 that the evidence suggests that there is a municipal policy  
3 there of tolerating this sort of overcrowding and this  
4 shorthanding of staff and undermonitoring of conditions and  
5 shortages of basic necessities, that tolerance they shouldn't  
6 be able to raise that as a defense that they can just move  
7 around inmates to avoid liability.

8 THE COURT: In other words, you are saying that the  
9 depravation of Otis Bantum all contribute to the tension within  
10 the entire institution when people are transferred to the next  
11 institution and have the same deprivations that they are more  
12 likely to get into fights and get the physical attacks?

13 MS. SCHOTT: That's correct.

14 THE COURT: I suppose you might be able to get an  
15 expert to testify on that.

16 MS. SCHOTT: I would like to take the opportunity to  
17 answer some questions that came up. You asked earlier about  
18 *Benjamin v. Frasier*. That was actually a case where a consent  
19 decree had been put into place. So for a very long period the  
20 parties had agreed that the conditions there were  
21 unconstitutional. Then what happened after the PLRA was  
22 enacted, defendants moved to vacate the consent decree so there  
23 was litigation over that. Those procedural issues are not  
24 germane here; but as your Honor correctly pointed out, many of  
25 the cases that the defendants have relied upon are summary

48t6cria

1 judgment cases or cases where there were even trials. And we  
2 would submit that plaintiff has made a sufficient showing of  
3 receipt and had discovery and be offered the opportunity to  
4 prove up his case.

5 If your Honor has no further questions, I will turn it  
6 over.

7 THE COURT: No, thank you.

8 MS. DORFMAN: Your Honor, may I take a few moments to  
9 reply to a couple of the points?

10 THE COURT: Just rebuttal. Short rebuttal. Make it  
11 very short.

12 MS. DORFMAN: Thank you.

13 The first, I guess, the main thing I want to reply to  
14 is the plaintiff's notion that the OBCC and the EMTC and GRVC  
15 should all be treated as one jail. Here plaintiffs have made  
16 allegations and in fact named as defendants different wardens  
17 of the different facilities. So we have Warden Shaw at GRVC,  
18 Warden Hauerhane at OBCC, and then the wardens of EMTC.

19 THE COURT: And Mr. Horn.

20 MS. DORFMAN: And Mr. Horn.

21 They have been named in his individual capacities as  
22 well as in their official capacities. In order to state a  
23 claim for 1993 violations, there has to be some either personal  
24 involvement alleged or there has to be some reasonable facts  
25 alleged that would show that they would have knowledge or as

48t6cria

1 the plaintiffs have alleged they would have constructive  
2 knowledge about the conditions.

3 Here the plaintiffs also allege that these wardens are  
4 specifically responsible for their own facilities not for each  
5 other's facilities. So I would again ask that the claims  
6 for -- that the whole complaint be dismissed on the basis of  
7 all of my argument but also just highlight that in terms of the  
8 claims against OBCC and Warden Hauerhane that those should be  
9 in fact treated separately from EMTC and GRVC and the like for  
10 the rest of them.

11 The other point that I just want to make is that in  
12 terms of the assaults, I want to first of all clarify that in a  
13 pleading error -- in a typo I was not saying that those  
14 physical injuries were not the kind that were barred by the  
15 PLRA. I was saying the rest of his injuries. I just wanted to  
16 clarify that.

17 I would also like to say that I still don't believe  
18 that he has met the pleading requirements for constitutional  
19 violations to show that the assaults were constitutional  
20 violations. In the instant of the first assault, he admits  
21 that he put himself into that position there and that in order  
22 to be able to show liability there has to be a showing that  
23 there was a specific knowledge of a specific risk in order to  
24 show personal liability and to show that there was a policy or  
25 procedure. This isn't sufficient to just say that the wardens

48t6cria

1 and Mr. Horn should have been aware of general conditions.

2 The second assault, I don't believe that the  
3 plaintiffs can show deliberate indifference because after he  
4 was assaulted, he was as they claim put into protective custody  
5 to protect him. So they took steps to protect him from any  
6 further harm.

7 Thank you, your Honor.

8 THE COURT: I am going to deny the motion to dismiss  
9 and I may do so because I think it is possible that the  
10 plaintiffs could prove the conditions in one of the  
11 institutions could affect the general attitude and danger -- to  
12 the dangerous situation which prisoners could be subjected to  
13 in the prison. People's attitudes are built up over a period  
14 of time, they are built up by deprivations unfortunately of  
15 small things as well as large things. So it is a matter of  
16 cumulative effect and I think the Court has to look at the  
17 totality of the circumstances to determine whether that  
18 cumulative effect applies in this case. So the motion is  
19 denied.

20 Parties will proceed to discovery.

21 Have you agreed on a discovery schedule?

22 MS. SCHOTT: We have not.

23 THE COURT: Will you submit a discovery schedule for  
24 the Court in the next two weeks.

25 MR. BERNARD: Yes, we will do so. We will talk to

48t6cria

1 Ms. Dorfman's office.

2 THE COURT: The other cases are in the course of  
3 settlement?

4 MS. SCHOTT: The matters have been resolved.

5 THE COURT: They have been? I haven't gotten a  
6 stipulation.

7 MS. SCHOTT: We are still processing the paperwork,  
8 but we don't expect any difficulties with that following  
9 through.

10 THE COURT: Can we do that in the next two weeks?

11 MS. DORFMAN: Your Honor, the City can certainly  
12 submit a stipulation at any time. The paperwork I can't  
13 guarantee that the plaintiffs will have their checks in two  
14 weeks. There is a certain process.

15 THE COURT: I am a volunteer in this matter so I  
16 recognize that I have to do volunteer service from time to time  
17 but these are Judge Hellerstein's cases. Maybe they were  
18 someone else's before that. I would like to clear out the  
19 docket as soon as I can so if you can do it in the next couple  
20 weeks, I would appreciate it.

21 MS. DORFMAN: Thank you.

22 MS. SCHOTT: Thank you, your Honor.

23 o0o

24

25